the corporation's managers to commit war crimes * * * the corporation can be civilly liable.").[16]

In short, the prohibition against war crimes extends to corporations.

VII. THE SLAVERY PROHIBITION IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Slavery Prohibition Is A Specific, Universal, And Obligatory Norm.

International law has long prohibited slavery, which is defined as the exercise of any or all of the powers attaching to the right of ownership over a human being. Slavery Convention art. 1, Sept. 25, 1926, 46 Stat. 483, 60 L.N.T.S. 254. The first international human rights courts, established in the early and mid-1800s, were antislavery courts that freed over 80,000 slaves. Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 Yale L.

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[16] Other states have similarly recognized that corporations can be held responsible for war crimes. See, *e.g.*, Tom Miles & Emma Farge, *Switzerland Opens Probe into Gold Refiner Argor for Congo Dealings*, Reuters (Nov. 4, 2013), http://www.reuters.com/article/congo-gold-idUSL5N0IP29K20131104 (describing investigation by Swiss prosecutor of corporation Argor-Hereaus for alleged war crimes); Crimes Against Humanity and War Crimes Act § 8(b)(4)(1), S.C. 2000, c. 24 (Can.) ("Every person is guilty of an indictable offence who commits * * * a war crime."); Interpretation Act § 35 R.S.C. 1985, c. I-21 (Can.) (defining "person" to include corporations).

J. 550, 552-553 (2008). Subsequent instruments of international human rights and criminal law unanimously condemn slavery. See, *e.g.*, UDHR art. 4; ICCPR art. 8; Rome Statute art. 7; ICTY Statute art. 5; ICTR Statute art. 3; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3; U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons (Trafficking Protocol) art. 3, Nov. 15, 2000, 2237 U.N.T.S. 319.

U.S. courts have recognized that the slavery prohibition is a *jus cogens* norm. *Kadic*, 70 F.3d at 239 (finding that slave trade violates the law of nations "whether undertaken by those acting under the auspices of a state or only as private individuals"); *Comm. of U.S. Citizens Living in Nicaragua* v. *Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988) (noting prohibition of slavery among *jus cogens* norms); see also Restatement (Third) of Foreign Relations Law § 702(b) (1987) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones * * * slavery or slave trade.").

B. The Slavery Prohibition Extends To Corporations.

The prohibition against slavery is not limited to either a category of perpetrator or natural persons. International human rights treaties refer to the right to be free of slavery as a universal human right irrespective of the perpetrator. See, *e.g.*, ICCPR art. 8 ("No one

shall be held in slavery; slavery and the slave-trade *in all their forms* shall be prohibited.") (emphasis added). International criminal law defines the crime of enslavement by the nature of the act, not the identity of the perpetrator. See, *e.g.*, Rome Statute art. 7(2)(c) (defining "enslavement" as "the exercise of any or all of the powers attaching to the right of ownership over a person").

On the contrary, international law explicitly contemplates application of the norm to organizations and groups of private actors and has for centuries. In the 1880s, antislavery courts seized, condemned, and allowed the auctioning of over 550 ships for participating in slave trade. Martinez, *supra*, 590-591. In recent times, for example, the Council of Europe Convention on Action Against Trafficking in Human Beings, May 16, 2005, C.E.T.S. 197, explicitly refers to corporate liability for human trafficking. It includes an article titled "[c]orporate liability," which commits member states to "ensure that a legal person can be held liable where the lack of supervision or control by a natural person * * * has made possible the commission of a criminal offence * * * ." *Id.* art. 22(2). Corporate liability may be "criminal, civil or administrative," depending on the member state's legal systems. *Id.* art. 22(3).

Nuremberg tribunals confirm that corporations can violate the international prohibition against slavery and did so during World War II. *Farben Case*, at 1173-1174; *Krupp Case*, at 1434. While the International Military Tribunal could not reach the question

of liability as these corporations had already been dissolved several years prior, it nevertheless noted these violations. See Control Council Law No. 9, *Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof*, Nov. 30, 1945, *reprinted in* 1 *Enactments and Approved Papers of the Control Council and Coordinating Committee* 225 (1945); General Order No. 3 (Pursuant to Military Government Law No. 52 – Blocking and Control of Property): Firma Friedrich Krupp, *Military Government Gazette, Germany, British Zone of Control*, No. 5, at 62 (1945). Exemptions of corporations from war criminal prosecutions should not lead to the conclusion that corporations are "exempt" from liability under international law. *Flomo*, 643 F.3d at 1019.

U.S. courts have increasingly recognized or assumed corporate liability for violating the prohibition against slavery under international law. See, *e.g.*, *Doe I*, 766 F.3d at 1020-1023 (affirming *Sarei*, 671 F.3d at 747); *Flomo*, 643 F.3d at 1019; *Licea* v. *Curacao Drydock Co.*, 584 F. Supp. 2d 1355, 1363-1366 (S.D. Fla. 2008). The Ninth Circuit held that allowing incorporation to create "legal absolution" for slavery would be "contrary to both the categorical nature of the prohibition on slavery and the moral imperative." *Doe I*, 755 F.3d at 1022 (citing *Kiobel*, 621 F.3d at 155 (Leval, J., concurring in the judgment)).[17]

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[17] Other countries have similarly recognized that corporations can be held liable for violating the prohibition on slavery. See, *e.g.*, *Araya* v. *Nevsun Resources Ltd.*, 2016 BCSC 1856 (ruling that a customary international law tort claim including slavery

In short, the international law prohibition on slavery extends to corporations.

VIII. THE PIRACY PROHIBITION IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Piracy Prohibition Is A Specific, Universal, And Obligatory Norm.

Piracy is a long-recognized prohibitory norm of international law from which no derogation is permitted. The United Nations Convention on the Law of the Sea (UNCLOS), which has been ratified by 168 states, sets forth the modern legal framework prohibiting piracy. United Nations Convention on the Law of the Sea, art. 101(a), Dec. 10, 1982, 1833 U.N.T.S. 397. UNCLOS reflects the historical understanding that piracy is both universally wrong and subject to universal jurisdiction. See International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses* 3 (2000).[18]

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allegations against a corporation has a reasonable chance of success); Silvia Rodríguez-López, *Criminal Liability of Legal Persons for Human Trafficking Offences in International and European Law*, 1 J. Trafficking & Hum. Exploitation 95, 96, 107 (2017) (noting that most EU Member States have legislation that requires imposing sanctions on legal entities and that a Belgian court convicted two companies for human trafficking).

[18] Although not a party to the Convention, the United States has recognized UNCLOS as reflecting customary international

For nearly two centuries, this Court has recognized piracy to be "an offence against the law of nations, [and] an offence against the universal law of society, a pirate being deemed an enemy of the human race." *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820). In *Kiobel*, this Court affirmed that piracy is the archetypical crime providing cause-of-action under the ATS. *Kiobel*, 133 S. Ct. at 1667. In *Sosa*, this Court likewise acknowledged that piracy not only is a violation of customary international law but one of the "historical paradigms" that the ATS was enacted to redress. *Sosa*, 542 U.S. at 715, 732.

B. The Piracy Prohibition Extends To Corporations.

The prohibition on piracy applies explicitly to private actors. Piracy is one of the principal cases constituting "offences against that universal law, committed by *private persons*." 4 William Blackstone, *Commentaries* *73 (emphasis added); see *Ali Shafi* v. *Palestinian Auth.*, 642 F.3d 1088, 1096 (D.C. Cir. 2011) (citing *Smith*, 18 U.S. (5 Wheat.) at 163 n.h) ("[P]iracy in violation of the law of nations is by definition perpetrated by nonstate actors."); UNCLOS art. 101 (specifying that piracy is "committed for private ends by the crew or the passengers of a private ship or a private aircraft").

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law. See, *e.g.*, U.S. Dep't of State, *Digest of United States Practice in International Law* 480 (Elizabeth R. Wilcox ed., 2009).

Eighteenth century pirate ships were profit-driven entities whose organizational structures reflected their mode of financing and financial goals. See Peter T. Leeson, *The Invisible Hook: The Hidden Economics of Pirates* 41-42, 81 (2009). In the same way that shareholders bear the financial cost of corporate liability, legal judgments against pirate ships impose costs on the ship's owners. *Flomo*, 643 F.3d at 1021 ("Of course the burden of confiscation of a pirate ship falls ultimately on the ship's owners, but similarly the burden of a fine imposed on a corporation falls ultimately on the shareholders."). The U.N. Monitoring Group on Somalia has observed that pirate networks follow a typical "business model," Rep. of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1853 (2008), Security Council, annex III, U.N. Doc. S/2010/91 (Mar. 10, 2010), that approximates a limited partnership such that "[t]he possibility of pirates operating through the corporate form is not far-fetched," *Kiobel*, 621 F.3d at 156 n.10 (Leval, J., concurring in the judgment).

International authorities recognize that the prohibition against piracy also implies liability for those entities who support pirate groups. The U.N. Security Council has explicitly stated that "individuals and entities who incite or intentionally facilitate an act of piracy are themselves engaging in piracy as defined under international law." S.C. Res. 1976 ¶ 15, U.N. Doc. S/RES/1976 (Apr. 11, 2011). Thus, organizations that finance and invest in pirate groups are to be held responsible for this activity. S.C. Res. 2125, U.N. Doc.

S/RES/2125 (Nov. 18, 2013) (recognizing "the need to investigate and prosecute * * * anyone who incites or intentionally facilitates piracy operations, including [those who] * * * illicitly finance or profit from such attacks").

In recent years, U.S. courts have held accountable those who support and enable piracy. See *United States* v. *Shibin*, 722 F.3d 233 (4th Cir. 2013); *United States* v. *Ali*, 718 F.3d 929 (D.C. Cir. 2013). These modern holdings reflect the longstanding understanding in the United States and abroad that those who intentionally enable piracy may be held liable for their actions. See, *e.g.*, *Talbot* v. *Jansen*, 3 U.S. (3 Dall.) 133 (1795); *United States* v. *Ross*, 27 F. Cas. 899, 901 (C.C.R.I. 1813); The Trial of John Williams, et al. on an Indictment for Murder on the High Seas: Before the Circuit Court of the United States, Holden for the District of Massachusetts, at Boston, on the 28th of December, 1818 (1819); Note, Martha Lovejoy, *From Aiding Pirates to Aiding Human Rights Abusers: Translating the Eighteenth-Century Paradigm of the Law of Nations for the Alien Tort Statute*, 12 Yale H.R. Dev. J. 241, 256-265 (2009).

In short, the prohibition on piracy extends to corporations.

* * *

As petitioners have shown, corporations and other private organizations are not categorically incapable of violating international law. This brief has further demonstrated on a norm-by-norm basis that corporations and other organizations are specifically capable

of violating many of the major prohibitory norms of international law that serve as a basis for actions under the ATS, including the norms that are at issue in the *Jesner* case.

CONCLUSION

Accordingly, the judgment of the court of appeals should be reversed.

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RECORD
AND
BRIEFS

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In The
Supreme Court of the United States

JOSEPH JESNER, et al.,

Petitioners,

v.

ARAB BANK, PLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF YALE LAW SCHOOL CENTER FOR GLOBAL LEGAL CHALLENGES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The Yale Law School Center for Global Legal Challenges is an independent Center that promotes the understanding of international law, national security law, and foreign affairs law.[1] The Center aims to close the divide between the legal academy and legal practice by connecting the legal academy to U.S. government actors responsible for addressing international legal challenges. In the process, the Center aims to promote greater understanding of legal issues of global importance – encouraging the legal academy to better grasp the real legal challenges faced by U.S. government actors and encouraging those same government actors to draw upon the expertise available within the legal academy. The Center files this brief to promote accurate interpretation of international law in this case by providing the Court with an examination of prohibitory norms of international law that apply to corporations and other organizations.

SUMMARY OF ARGUMENT

Petitioners contend that there is no basis for categorically excluding corporations or other organizations

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office. The views expressed in this brief are not necessarily those of the Yale Law School or Yale University.

as defendants under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. The Center agrees.

We submit this brief to address a related issue: whether *specific* prohibitory norms of international law apply to corporations. ATS lawsuits rest upon claimed violations of prohibitory norms such as genocide, crimes against humanity, terrorist financing, torture, extrajudicial killing, war crimes, slavery, and piracy.[2] In this brief we show that each of these norms is specific, universal, and obligatory and that each of these norms extends to corporations. This analysis supports petitioners' argument that corporations are not categorically excluded from liability under the ATS.

ARGUMENT

The approach adopted in this brief follows upon this Court's observation that a consideration in determining whether an ATS case may proceed is whether "a given norm" extends "to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692,

[2] See, *e.g.*, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 720 (2004) (discussing claims cognizable under the ATS from its inception, including piracy); *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 758-767 (9th Cir. 2011) (en banc) (genocide and war crimes), vacated on other grounds, *Rio Tinto PLC* v. *Sarei*, 133 S. Ct. 1995 (2013); *Al Shimari* v. *CACI Premier Technology Inc.*, 840 F.3d 147, 151, 162 (4th Cir. 2016) (torture and war crimes); *Doe I* v. *Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014) (slavery).

732 n.20 (2004). The en banc Ninth Circuit concluded from this that the inquiry "should consider *separately* each violation of international law alleged and which actors may violate it," *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 748 (9th Cir. 2011) (en banc) (emphasis added), vacated on other grounds, 133 S. Ct. 1995 (2013), because "the handful of international law violations that may give rise to an ATS claim are often restricted by the identity of the perpetrator, the identity of the victim, or the locus of events." *Id.* at 785-786 (McKeown, J., concurring).

Some international law norms apply to the conduct of all actors. By contrast, some norms do not – for example, they may apply only to State actors or those who act in concert with a State. "The particularity of each norm highlights the importance of conducting a norm-specific inquiry as to each alleged violation of international law" to determine if a claim may be maintained under the ATS. *Id.* at 786.

At the outset, we note a critical difference between the *applicability* of an international law norm and whether *liability* should be imposed upon a party who violates an applicable norm. The majority of the Second Circuit wrongly elided this distinction in *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), aff'd on other grounds, 133 S. Ct. 1659 (2014), conflating the absence of international law precedent holding corporations criminally liable with a conclusion that

prohibitory norms of international law have no application to what corporations do.[3]

Liability for violating a norm only exists where a court has jurisdiction over an actor to whom that norm applies. The ATS is a jurisdiction-granting statute.[4] *Sosa*, 542 U.S. at 712. It serves a similar role to the Rome Statute of the International Criminal Court (ICC), July 17, 1998, 2187 U.N.T.S. 90 (Rome Statute), the Statutes of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1192 (ICTY Statute), and the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598 (ICTR Statute). These charters do not create substantive law; instead, they create jurisdiction for the relevant tribunals to try those who are alleged to have violated existing norms of international law.[5] Corporations are

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[3] *Cf. Kiobel*, 621 F.3d at 152 (Leval, J., concurring in the judgment); *Doe* v. *Exxon Mobil*, 654 F.3d 11, 50 (D.C. Cir. 2011) (noting that "[t]he Second Circuit's approach overlooks the key distinction between norms of conduct and remedies").

[4] The ATS grants jurisdiction over a civil action by an alien for violations of certain well-established norms of international law. Hence, "international law extends the scope of liability to the perpetrator being sued," *Sosa*, 542 U.S. at 732 n.20, only if the international law norm extends to that perpetrator.

[5] See, *e.g.*, U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), ¶ 29, U.N. Doc. S/25704 (May 3, 1993); *Prosecutor* v. *Tadic*, Case No. IT-94-1-T, Judgment, ¶¶ 662, 669 (ICTY May 7, 1998); Rome Statute art. 5, ¶ 1.

not liable before these tribunals because their charters extend jurisdiction only to "natural persons."[6]

The ATS also grants limited jurisdiction: it allows for a "civil action" filed by an "alien," "for a tort only." 28 U.S.C. § 1350. Moreover, it relies on international law to determine whether the tort is "committed in violation of the law of nations * * * ." *Ibid.* The ATS, however, contains no limitation on who may be sued. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). Accordingly, when an ATS suit is filed against a corporation, whether there is an actionable "violation of the law of nations" depends in part on whether the particular international law norm at issue is capable of being violated by a corporation.

The ATS, moreover, is far from alone. There are myriad foreign domestic law statutes that provide jurisdiction over violations of the law of nations, each with its own particular jurisdictional scope.[7] Notably, states that are party to the Rome Statute have nearly all enacted statutes that provide for criminal law jurisdiction over at least one of the violations of the law of

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[6] See Rome Statute art. 25(1); ICTY Statute art. 6; ICTR Statute art. 5.

[7] See *Sources for Supplemental Brief of Yale Law School Center for Global Legal Challenges:* Kiobel *v.* Royal Dutch Petroleum, Yale Law School Lillian Goldman Law Library Documents Collection Center, http://documents.law.yale.edu/kiobel-v-royal-dutch (providing links to fifty foreign statutes).

nations addressed in that statute in their own domestic courts.[8] A significant portion of these states also provide for civil liability against those who have committed such violations.[9] Many, moreover, extend liability to corporations. See Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law*, FAFO, 16 (2006), https://www.biicl.org/files/4364_536.pdf ("Since most of the countries that have incorporated ICL [international criminal law] into their domestic statutes also do not make a distinction between natural and legal persons * * *, these jurisdictions include corporations and other legal persons in their web of liability."). See also Robert C. Thompson, Anita Ramasastry & Mark B. Taylor, *Translating* Unocal: *The Expanding Web of*

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[8] See *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update*, Amnesty International (2012), https://www.amnesty.org/en/documents/ior53/019/2012/en/ ("166 (approximately 86%) of the 193 UN member states have defined one or more of four crimes under international law (war crimes, crimes against humanity, genocide and torture) as crimes in their national law."). See also Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights art. 46C, African Union, June 27, 2014, https://www.au.int/web/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (granting jurisdiction over corporations that commit, *inter alia*, war crimes, crimes against humanity, genocide) (not in force).

[9] See, *e.g.*, Code de Procédure Pénale [Code of Criminal Procedure] art. 4 (Belg.); Code de Procédure Pénale [Code of Criminal Procedure] art. 3 (Fr.); Código Penal [Criminal Code] art. 118-119, http://noticias.juridicas.com/base_datos/Penal/lo10-1995.html (Spain).

Liability for Business Entities Implicated in International Crimes, 40 Geo. Wash. Int'l L. Rev. 841, 871 (2009) (noting that "Australia, Belgium, Canada, France, India, the Netherlands, Norway, and the United Kingdom * * * make it a general practice to recognize no distinction between natural and legal persons, thus giving [international criminal law] a wider reach at the domestic level.").

This brief focuses on the applicability of specific international law norms to corporate conduct. It conducts a norm-by-norm analysis of eight prohibitory norms of international law, the first three of which are at issue in this case: genocide, crimes against humanity, financing terrorism, torture, extrajudicial killing, war crimes, slavery, and piracy. First, it briefly defines the contours of these prohibitions, showing that they are sufficiently specific, universal, and obligatory to meet the requirements set out in *Sosa*, and, second, it shows that the prohibitions apply to corporations. This norm-by-norm analysis supports petitioner's broader contention that corporations are not categorically excluded from the universe of parties who may be held liable under the ATS.

I. THE GENOCIDE PROHIBITION IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Genocide Prohibition Is A Specific, Universal, And Obligatory Norm.

Genocide is defined as an act "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277. This definition is common to all relevant international instruments. See Rome Statute art. 6; ICTY Statute art. 4; ICTR Statute art. 2. The Genocide Convention, to which 147 states are party, including the United States, affirms that genocide is "a crime under international law." Genocide Convention art. 1. The International Court of Justice (ICJ) has found genocide to be a peremptory – or *jus cogens* – norm from which no derogation is permitted. *Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo* v. *Rwanda)*, Judgment, 2006 I.C.J. 29, ¶ 64 (Feb. 3).

U.S. courts have consistently found that the prohibition on genocide is a universally accepted norm. See, *e.g.*, *Sarei*, 671 F.3d at 759 ("[T]he *jus cogens* norm prohibiting genocide is sufficiently specific to give rise to an ATS claim."); *Kadic* v. *Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995).

B. The Genocide Prohibition Extends To Corporations.

All international instruments that prohibit genocide define it according to prohibited acts, without reference to the actor. See Genocide Convention art. 2; Rome Statute art. 6; ICTY Statute art. 4; ICTR Statute art. 2. The prohibition clearly applies to private actors. The Genocide Convention explicitly establishes that "[p]ersons committing genocide * * * shall be punished, whether they are constitutionally responsible rulers, public officials or *private* individuals." Genocide Convention art. 4 (emphasis added).

The ICJ, the authoritative interpreter of the Genocide Convention,[10] has explained that genocide can be committed by private entities. In *Bosnian Genocide*, the ICJ discussed "persons *or entities* that committed the acts of genocide at Srebrenica." *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) (Bosnian Genocide)*, Judgment, 2007 I.C.J. 43, ¶ 393 (Feb. 26) (emphasis added). In an earlier order, it had instructed the Yugoslav government to "ensure that any military, *paramilitary* or irregular armed units * * * as well as any *organizations* and persons which may be subject to its control, direction or influence, do not commit any acts of genocide * * * ." *Bosnian Genocide*,

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[10] See Genocide Convention art. 9 ("Disputes * * * relating to the interpretation, application or fulfilment of the present Convention * * * shall be submitted to the International Court of Justice * * * .").

Preliminary Objections, 1993 I.C.J. 3, ¶ 52 (Apr. 8) (emphasis added). It is therefore clear that the ICJ considers genocide committed by private entities a "crime under international law." *Id.* ¶ 45 (quoting Genocide Convention art. 1).

The ICTR has explicitly extended the genocide norm to corporations. In *Prosecutor* v. *Nahimana*, Case No. ICTR 99-52-T, Judgment (Dec. 3, 2003), the Trial Chamber held that the radio station RTLM, a corporate entity, *id.* ¶ 552, incited genocide through broadcasts. *Id.* ¶¶ 949, 952-953. One company director was found guilty of genocide for "his active engagement in the management of RTLM" and "failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians instigated by RTLM." *Id.* ¶ 973. Another director was found guilty because he used RTLM as his "weapon of choice * * * to instigate the killing of Tutsi civilians." *Id.* ¶ 974. Although the ICTR's criminal jurisdiction extends only to individuals, the Trial Chamber made clear that a company, RTLM, violated the international norm against genocide.

U.S. law's prohibition on genocide encompasses corporations. 18 U.S.C. § 1091(a) (holding accountable "whoever, whether in time of peace or in time of war" commits or incites genocide); 1 U.S.C. § 1 (defining "whoever" "to include corporations"). U.S. courts, moreover, have repeatedly applied the prohibition of genocide to private actors, including corporations. See, *e.g.*, *Sarei*, 671 F.3d at 760 ("Given that an amorphous group, a state, and a private individual may all violate the *jus cogens* norm prohibiting genocide, corporations

likewise can commit genocide under international law because the prohibition is universal."); *In re South African Apartheid Litigation*, 15 F. Supp. 3d 454 (S.D.N.Y. 2014) (asserting jurisdiction over corporate defendants for violations including genocide). In *Sosa*, this Court noted approvingly the Second Circuit's view that there is "sufficient consensus * * * that genocide by private actors violates international law." *Sosa*, 542 U.S. at 732 n.20 (citing *Kadic*, 70 F.3d at 239-241).

In short, the genocide prohibition extends to private groups and organizations, including corporations.

II. THE CRIMES AGAINST HUMANITY PROHIBITION IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Crimes Against Humanity Prohibition Is A Specific, Universal, And Obligatory Norm.

International law recognizes a universal prohibition on crimes against humanity, defined as the commission of a prohibited act with knowledge that the act is part of a widespread or systematic attack directed against a civilian population. The prohibition of crimes against humanity dates from Nuremberg, Nuremburg Charter art. 6(c), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 282, and has been repeatedly reaffirmed

in international instruments and the charters of international tribunals. See, *e.g.*, Convention on the Non-Applicability of Statutory Limits to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73; Rome Statute art. 7; ICTY Statute art. 5; ICTR Statute art. 3; see also *Prosecutor* v. *Tadic*, Case No. IT-94-1-T ¶ 623 (ICTY May 7, 1997) (noting that the customary status of the prohibition has "not been seriously questioned" since the Nuremberg Charter).

U.S. courts, including in this case, have recognized the prohibition of crimes against humanity as a universally accepted norm. See, *e.g.*, *Flores* v. *Southern Peru Copper Corp.*, 414 F.3d 233, 244 n.18 (2d Cir. 2003); *Quinn* v. *Robinson*, 783 F.2d 776, 799 (9th Cir. 1986); *Almog* v. *Arab Bank, PLC*, 471 F. Supp. 2d 257, 274 (E.D.N.Y. 2007).

B. The Crimes Against Humanity Prohibition Extends To Corporations.

Corporations are capable of committing crimes against humanity. The customary international law norm depends on the act itself, rather than the identity of the perpetrator. The Rome Statute makes clear that a "'crime against humanity' means *any* of the [enumerated] *acts*" and makes no distinction as to the actor responsible. Rome Statute art. 7(1) (emphasis added). Both the ICTY and the ICTR Statutes refer to "the following crimes [when directed against] any civilian population" and do not limit the definition of the crime to a particular actor. ICTY Statute art. 5; ICTR Statute

art. 3. Indeed, the U.N. International Law Commission has provisionally adopted a draft convention that explicitly recognizes that corporations may violate the prohibition against crimes against humanity. International Law Commission, Crimes Against Humanity: Texts and Titles of the Draft Preamble, the Draft Articles and the Draft Annex Provisionally Adopted by the Drafting Committee on First Reading, Rep. on the Work of Its Sixty-Ninth Session, U.N. Doc A/CN.4/L.892, at 6 (2017) ("[E]ach State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article.").

International criminal jurisprudence dating from Nuremberg demonstrates that the crimes against humanity prohibition includes groups and organizations. The Nuremberg Charter states that the "[t]ribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a *criminal organization.*" Nuremburg Charter art. 9 (emphasis added); see also Control Council Law No. 10 art. 2(2), *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 20, 1945, *reprinted in* 1 *Enactments and Approved Papers of the Control Council and Coordinating Committee* 306 (1945).[11] The Nuremberg tribunals, moreover, recognized that corporate conduct could violate the

[11] The Allied Control Council was the governing body of the military occupation of Germany after World War II ended in Europe.

prohibition on crimes against humanity. Twenty-three executives at I.G. Farben, a corporation responsible for the production of Zyklon B gas used at Auschwitz, were charged for "collective[]" actions utilizing the "instrumentality" of Farben. *United States* v. *Krauch* (*Farben Case*), 8 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 1166 (1981).

Modern jurisprudence further shows that private groups and organizations can violate the crimes against humanity prohibition. The ICTY has held that crimes against humanity can be committed by groups and organizations. *Tadic*, ¶ 654 ("[C]rimes against humanity can be committed * * * by a terrorist group or organization."). In a particularly notable case earlier this year in Colombia, "around 200 local and international companies" were charged with committing "crimes against humanity for allegedly financing paramilitary death squads in northern Colombia." *Financiación de empresas bananeras a grupos paramilitares es delito de lesa humanidad* [Banana Companies Financing Paramilitary Groups is a Crime Against Humanity], Gen. Prosecutor's Off. (Colom.) (Feb. 2, 2017), http://www.fiscalia.gov.co/colombia/noticias/financiacion-de-empresas-bananeras-a-grupos-paramilitares-es-delito-de-lesa-humanidad/.

U.S. courts have specifically recognized that the crimes against humanity prohibition applies to corporate actors. See, *e.g.*, *Flomo* v. *Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011) (rejecting defendant's argument that "there cannot be a norm, let

alone a 'universal' one, forbidding them [corporations] to commit crimes against humanity and other acts that the civilized world abhors").

In short, the crimes against humanity prohibition extends to corporations.

III. THE FINANCING TERRORISM PROHIBITION IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Financing Terrorism Prohibition Is A Specific, Universal, And Obligatory Norm.

Terrorist financing is defined as "directly or indirectly, unlawfully and willfully, provid[ing] or collect[ing] funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" acts of terror. International Convention for the Suppression of the Financing of Terrorism (ICSFT) art. 2, ¶ 1, Dec. 9, 1999, S. Treaty Doc. No. 49 (2001), 2178 U.N.T.S. 197. The ICSFT, to which 188 states including the United States are party, adopts the definition of terrorism provided in the International Convention for the Suppression of Terrorist Bombings and requires state parties to take measures to prohibit "illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission" of such acts. *Id.* at

arts. 2 & 18(1)(a).[12] See International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 116 Stat. 721, 2149 U.N.T.S. 284.

The United States has directly implemented the ICSFT by criminalizing acts within the definition of terrorist financing found in Article 2. 18 U.S.C. § 2339C. Congress has also prohibited the provision of material support to terrorist groups. 18 U.S.C. § 2339B. In doing so, it reasoned that since "the Constitution confers upon Congress the power to punish crimes against the law of nations * * * Congress may by law impose penalties relating to the provision of material support" to terrorist groups. 18 U.S.C. § 2339B note (Findings and Purpose). The U.N. Security Council, in a Resolution sponsored by the U.S. Government, affirmed that measures taken to "knowingly financ[e], plan[] and incit[e] terrorist acts are * * * contrary to the purposes and principles of the United Nations * * * ." S.C. Res. 1373, ¶ 5, U.N. Doc. S/RES/1373 (Sept. 28, 2001). Indeed, U.N. Security Council Resolution

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[12] In addition, several regional organizations have incorporated the ICSFT. See Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism ch. 1 art. 1(h), May 16, 2005, C.E.T.S. 198; Inter-American Convention Against Terrorism art. 1(j), June 3, 2002, O.A.S. Treaty A-66; Plan of Action of the African Union High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa art. III(C)(13)(a), Sept. 11-14, 2002, http://www.peaceau.org/uploads/au-anti-terrorism-plan-of-action.pdf.

1373 not only permits but *obligates* states to criminalize acts of terrorist financing within their domestic legal systems. *Id.* at ¶ 1(b).

The ICFST and Security Council prohibitions on terrorist financing, together with widespread domestic implementation of the prohibitions, strongly support the District Court's conclusion that the prohibition on terrorist financing "is of sufficiently definite content and acceptance among nations of the world as the historical paradigms familiar when § 1350 was enacted." *Almog*, 471 F. Supp. 2d at 285.

B. The Financing Terrorism Prohibition Extends To Corporations.

The international norm against terrorist financing applies to corporations. The ICSFT explicitly states that each state party "shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable" when it has committed an offense in violation of the Convention, including by funding terrorist activities. ICSFT arts. 2 & 5. It also requires states to prohibit the "illegal activities of persons and organizations" financing terror. *Id.* art. 18. See also Ilias Bantekas, *The International Law of Terrorist Financing*, 97 Am. J. Int'l L. 315, 324 (2003) ("[T]he relevant obligations in [the ICSFT's] provisions are also addressed to private legal entities * * * ."). In 2001, the U.N. Security Council made it mandatory for states to prohibit "persons and entities

within their territories" from financing terrorist activities. S.C. Res. 1373, ¶ 1(d). This requirement is binding on all 193 state parties to the U.N. Charter. Charter of the United Nations art. 25, June 26, 1945, 59 Stat. 1031, T. S. No. 993.

When it adopted the ICSFT into domestic criminal law, Congress recognized that the norm against terrorist financing applies to corporate entities. 18 U.S.C. § 2339C. Section 2339C adopts verbatim the ICSFT definition of terrorist financing and provides that "whoever" commits an offense under the Act and is subject to the jurisdiction of the United States shall be held criminally liable. *Ibid.* The term "whoever," as defined in the United States Code, includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

Around the world, states have adopted similar statutes criminalizing terrorist financing and have applied these statutes directly to corporations. For instance, in implementing U.N. Security Council Resolution 1373, the European Union member states "agreed that all offences linked to the financing of terrorism constitute a serious crime" and adopted "specific restrictive measures directed against certain persons and entities" that finance terror. European Union Delegation to the United Nations – New York, *EU Report to the Counter-Terrorism Committee – Res. 1373*, U.N. Doc. S/2001/1297 (Dec. 28, 2001); Council Regulation (EC) No. 2580/2001 of December 2001, L. 344 Official Journal of the European Communities 70

(2001), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0070:0075:EN:PDF.

In short, the prohibition against terrorist financing extends to corporations. Thus, the District Court correctly concluded that "Arab Bank's alleged conduct is exactly the type of conduct that the applicable Conventions and related U.S. laws are aimed at preventing." *Almog*, 471 F. Supp. 2d at 293.

IV. THE TORTURE PROHIBITION IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Torture Prohibition Is A Specific, Universal, And Obligatory Norm.

Torture is the infliction of physical or mental pain or suffering, for a prohibited purpose (such as obtaining information or a confession), "by or at the instigation of or with the consent or acquiescence of" a state actor. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) art. 1, ¶ 1, Dec. 10, 1984, 1465 U.N.T.S. 85. The CAT, to which 166 states including the United States are party, requires states party to prevent torture. *Id.* art. 2. The Universal Declaration of Human Rights (UDHR) mandates that "[n]o one shall be subjected to torture." UDHR art. 5, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). Similarly, the International Covenant on Civil and Political Rights (ICCPR) states: "No one shall be subjected to torture * * * ." ICCPR

art. 7, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171. The CAT, UDHR, and the ICCPR are but a few of numerous international instruments aimed at preventing torture.[13] Indeed, "[t]orture is prohibited under both conventional and customary international law," and this prohibition "can be said to constitute a norm of *jus cogens*." *Prosecutor* v. *Kunarac*, Case No. IT-96-23-T, Trial Judgment, ¶ 466 (ICTY Feb. 22, 2001) (internal footnotes omitted).

U.S. courts and authorities recognize that the prohibition against torture is universal, specific, and obligatory. See, *e.g.*, *Siderman de Blake* v. *Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (indicating that freedom from "official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*"); *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) ("[W]e have little difficulty discerning [torture's] universal renunciation in the modern usage and practice of nations."). More recently, members of this Court characterized torturers as "common enemies of all mankind," akin to the

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[13] See Organization of American States, Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67; African Charter on Human and Peoples' Rights art. 5, June 27, 1981, 1520 U.N.T.S. 217; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), annex, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034, at 91 (Dec. 9, 1975); Organization of American States, American Convention on Human Rights art. 5, § 2, Nov. 22, 1969, 1144 U.N.T.S. 123; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Feb. 1, 1989, E.T.S. 126.

pirates familiar to the Founding generation. *Kiobel*, 133 S. Ct. at 1672 (Breyer, J., concurring in the judgment).

B. The Torture Prohibition Extends To Corporations.

The international norm against torture applies to all actors, provided a State official acquiesces or the torture occurs under color of law. See, *e.g.*, CAT art. 1; *Kadic*, 70 F.3d at 243-245. The UDHR categorically prohibits torture and provides that "[n]othing in the Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." UDHR art. 30. The CAT requires that the pain or suffering must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," but it imposes no limitation on who can commit such acts. CAT art. 1. The CAT requires that each member State enact criminal penalties for torture and that criminal penalties "shall apply * * * to an act by any person which constitutes complicity or participation in torture." *Id.* art. 4. Moreover, none of the many other international treaties that prohibit torture exclude private actors. See *supra* note 13 (citing international instruments prohibiting torture).[14]

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[14] In *Mohamad* v. *Palestinian Authority et al.*, 566 U.S. 449, 457 n.4 (2012), this Court found that the term "individual" in the

The authoritative adjudicator and interpreter of the CAT, the United Nations Committee Against Torture, expressly acknowledges that private parties who act with state involvement are capable of committing torture in violation of international law. The Committee explains that States "bear international responsibility" for deeds committed by agents, private contractors, and others "acting on behalf of the State * * * or otherwise under colour of law." Committee Against Torture, General Comment No. 2 ¶ 15, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). A State party has an obligation to prevent and redress torture in any context where its non-intervention "enhances the danger of privately inflicted harm." *Id.* Indeed, a judicial bar against corporate liability would constitute an obstacle to the sort of redress the Convention envisions, because "[w]hen impunity is allowed by law or exists de facto, * * * it allows the violators to go unpunished and denies victims full assurance of their rights under article 14." Committee Against Torture, General Comment No. 3 ¶ 42, U.N. Doc. CAT/C/GC/3 (Dec. 13, 2012).

The torture norm applies to private parties who act with state involvement. The UDHR refutes the idea that "any State, *group* or person" has a right to impair "the rights and freedoms set forth herein," UDHR art. 30 (emphasis added), including the freedom that "[n]o one shall be subjected to torture," *id.* art. 5. The Committee Against Torture interprets the norm to

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Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note, encompasses only natural persons. But that term does not appear in any of the international instruments on torture.

bind institutions, including private ones. See, *e.g.*, General Comment No. 2 ¶ 15. Accordingly, foreign courts have found corporations may be held liable for torture. See, *e.g.*, *Guerrero* v. *Monterrico Metals PLC* [2009] EWHC (QB) 2475 (Eng.) (allowing a claim to proceed against a U.K.-incorporated company for its role in permitting torture and mistreatment in Peru); Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses*, Report Prepared for the Office of the U.N. High Commissioner for Human Rights 19 (2013) (noting ongoing suits in French courts against technology companies for, *inter alia*, aiding and abetting torture in Libya and Syria). U.S. courts have likewise recognized corporate liability for torture under the ATS. See, *e.g.*, *Al Shimari* v. *CACI Premier Tech., Inc.*, 840 F.3d at 151, 162 (political question doctrine does not preclude judicial review under the ATS of alleged torture by a government contractor).

In short, the prohibition against torture extends to corporations, provided that they act with the acquiescence of a State actor or under color of law.

V. THE EXTRAJUDICIAL KILLING PROHIBITION IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Extrajudicial Killing Prohibition Is A Specific, Universal, And Obligatory Norm.

Extrajudicial killing is the arbitrary deprivation of life. The UDHR establishes the "right to life." UDHR art. 3. Its corollary – the right to freedom from arbitrary deprivation of life – is reaffirmed in the ICCPR, as well as in numerous regional human rights instruments. ICCPR art. 6(1); African Charter on Human and Peoples' Rights art. 4, June 27, 1981, 1520 U.N.T.S. 217; American Convention on Human Rights art. 4, Nov. 22, 1969, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221.

U.S. courts treat the prohibition on extrajudicial killing as firmly established under customary law. See, *e.g.*, *Doe* v. *Exxon Mobil Corp.*, Civ. No. 01-1357, 2015 WL 5042118, at *5 (D.D.C. July 6, 2015); *Cabello* v. *Fernandez-Larios*, 402 F.3d 1148, 1157-1158 (11th Cir. 2005) (noting conclusions of courts that "where a defendant has been found directly or secondarily responsible for acts of torture or extrajudicial killing, the acts are in violation of the law of nations"); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 791 n.20 (D.C. Cir. 1984) (Edwards, J., concurring) (noting that "at least four acts [are] subject to unequivocal international

condemnation: torture, summary execution, genocide and slavery"); *Estate of Manook* v. *Research Triangle Inst., Int'l & Unity Res. Grp., L.L.C.*, 693 F. Supp. 2d 4, 18 (D.D.C. 2010) (noting that "Article 146 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War defines 'grave breaches' to include 'willful killing * * * of a protected person' ").

B. The Extrajudicial Killing Prohibition Extends To Corporations.

The prohibition against extrajudicial killing applies to any actor acting with the acquiescence of the State or under color of law. The U.N. Economic and Social Council, for example, has directed that extrajudicial killing "shall not be carried out under any circumstances including * * * *by a person acting at the instigation, or with the consent or acquiescence of*" a public official. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, E.S.C. Res. 1989/65, U.N. Doc. E/RES/1989/65 (May 24, 1989) (emphasis added). In this respect, the prohibitory norm against extrajudicial killing resembles the prohibitory norm against torture. See *supra* Part IV.B.

The U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Special Rapporteur) has concluded that, in the context of armed conflict, "both state and non-state actors can commit extrajudicial executions." Special Rapporteur, *Mission to the Philippines*, Human Rights Council, ¶ 5, U.N.

Doc. A/HRC/8/3/Add.2 (Apr. 16, 2008). Moreover, the Special Rapporteur specifically included corporate activity among examples of the conduct of private actors implicated in extrajudicial killings. See, *e.g.*, Special Rapporteur, *Mission to Nigeria*, Comm'n on Human Rights, ¶ 86, U.N. Doc. E/CN.4/2006/53/Add.4 (Jan. 7, 2006) ("Oil companies have long been accused of complicity in actions involving human rights violations including extrajudicial executions."); Special Rapporteur, *Summary of Cases Transmitted to Government and Replies Received*, Human Rights Council, 308-310, U.N. Doc. A/HRC/8/3/Add.1 (May 30, 2008) (reporting shooting of local residents by private security forces at a gold mine and Papua New Guinea's subsequent failure to investigate); Special Rapporteur, *Extrajudicial, Summary or Arbitrary Execution* ¶ 62, U.N. Doc. A/71/372 (Sept. 2, 2016) (underscoring that "the same precautionary principle applied to State law enforcement officials must also apply to private actors" including private security providers). These reports support the conclusion that corporations, like other private actors, are capable of violating the international law prohibition on extrajudicial killing.

International courts confirm that private actors are capable of committing extrajudicial killings. For example, the Inter-American Court of Human Rights held Colombia responsible for a massacre carried out by an independent paramilitary group with the "support or tolerance" of public authorities. *Case of the "Mapiripán Massacre" v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶ 110, 123, 138 (Sept. 15,

2005). The European Court of Human Rights found Turkey in breach of its duty to investigate a killing that occurred during a shootout between state security forces and a terrorist group even when Turkey claimed it had not been responsible for the death, holding that the State's duty to investigate extrajudicial killings "is not confined to cases where it has been established that the killing was caused by an agent of the State." *Ergi* v. *Turkey*, 1998-IV Eur. Ct. H.R. 365, 398. Similarly, in *Prosecutor* v. *Kayishema*, the ICTR applied Amnesty International's definition of extrajudicial killing as "unlawful and deliberate killings carried out with the order of a Government *or with its complicity or acquiescence*." Case No. ICTR 95-1-T, Judgment, ¶ 140 (May 21, 1999) (emphasis added).

U.S. courts have also found that corporations are capable of committing extrajudicial killings. See, *e.g.*, *Doe*, 2015 WL 5042118, at *2 (holding that "[c]orporations, such as defendants, may be held liable for causes of action arising under the ATS" in response to plaintiff's claims that "Exxon security personnel injured them by violating five norms of customary international law: the norms against torture; extrajudicial killing; cruel, inhuman, and degrading treatment ('CIDT'); arbitrary detention; and disappearance"); *In re S. African Apartheid Litig.*, 15 F. Supp. 3d 454, 461 (S.D.N.Y. 2014) ("[C]orporations may be held liable for claims brought under the ATS.").

In short, the prohibition of extrajudicial killing extends to corporations, provided that they act with the acquiescence of a State actor or under color of law.

VI. THE WAR CRIMES PROHIBITION IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The War Crimes Prohibition Is A Specific, Universal, And Obligatory Norm.

"War crimes" refers to serious violations of international humanitarian law, also known as the law of war. One hundred ninety-five states, including the United States, have agreed to the 1949 Geneva Conventions, which are the principal source of the law of war. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 Va. J. Int'l L. 149, 193-194 (2006). Other treaties also prohibit war crimes. See, *e.g.*, Rome Statute art. 8; ICTY Statute art. 3; ICTR Statute art. 4.

U.S. courts have concluded that the prohibition of war crimes is a universal, specific, and obligatory norm of customary international law. See, *e.g.*, *Sarei*, 671 F.3d at 763-764; *Kiobel*, 621 F.3d at 120.

B. The War Crimes Prohibition Extends To Corporations.

The major international instruments defining war crimes describe them solely in terms of prohibited conduct, without specifying the actor. See Rome Statute art. 8(1); ICTY Statute art. 3; ICTR Statute art. 4; Control Council Law No. 10 art. 2, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 20, 1945, *reprinted in* 1 *Enactments and Approved Papers of the Control Council and Coordinating Committee* 306 (1945). At least one instrument expressly applies the war crimes prohibition to corporations. See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights arts. 28D & 46C, African Union, June 27, 2014, https://www.au.int/web/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (recognizing Court's jurisdiction over both war crimes and corporations) (not in force).

The record of the Nuremberg Trials confirms that corporations can commit war crimes. Control Council Law No. 10 classifies "plunder of public or private property" as a war crime. Control Council Law No. 10 art. 2(b). In the *I.G. Farben* trial, the Nuremberg Military Tribunal explained that a juridical person who commits such plunder violates the law of war. *Farben Case*, at 1135. The Tribunal further found that "offences against property as defined in Control Council Law No. 10 were committed by Farben." *Id.* at 1140. In the

Krupp trial,[15] the Tribunal similarly declared that "the firm of Krupp" had exploited involuntary labor "in violation of the laws and customs of war." *United States* v. *Krupp* (*Krupp Case*), 9 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 1376 (1950). While the Tribunal in both cases only considered charges against individuals, its treatment of juridical persons demonstrates an assumption that corporations could commit war crimes.

U.S. law's prohibition on war crimes encompasses corporations. 18 U.S.C. § 2441(a) (holding accountable "whoever * * * commits a war crime"); 1 U.S.C. § 1 (defining "whoever" "to include corporations"). U.S. courts have repeatedly affirmed that the norm against war crimes applies to corporations. *Sarei*, 671 F.3d at 765 ("[I]nternational law extends the scope of liability for war crimes to all actors, including corporations."); *Doe I* v. *Nestle USA, Inc.*, 766 F.3d 1013, 1021-1022 (9th Cir. 2014) (citing with approval the *Sarei* court's ruling that the norm against war crimes applies to corporations); *Flomo*, 643 F.3d at 1019 ("If a corporation complicit in Nazi war crimes could be punished criminally for violating customary international law * * * then *a fortiori* if the board of directors of a corporation directs

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[15] Krupp was a corporation from 1903 to December 1943, after which it operated as an unincorporated, privately-owned firm. *United States* v. *Krupp* (*Krupp Case*), 9 *Trials of War Criminals Before the Nuernberg Military Tribunals* 1332 (1950). Krupp's use of concentration camp labor began in 1942, when it was still incorporated. *Id.* at 1412.